SUPREME COURT, U. S.
FILED
MAY 9 1967
JOHN F. DAVIS, CLERK

No. 1240

In the Supreme Court of the United States

OCTOBER TERM, 1966

CREAM CREST-BLANDING DAIRIES, INC.,
Petitioner,

v.

NATIONAL DAIRY PRODUCTS CORP.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: May 8, 1967

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MCCORMICK AND HENDERSON, INC., CHICAGO

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QUESTION PRESENTED

Whether petitioner's Amended Complaint was properly dismissed where the undisputed facts established that the transactions about which petitioner complained involved wholly *intrastate* price differentials within an intrastate area in which petitioner and respondent allegedly competed, and that such differentials were, therefore, not made "in commerce" as required by the provisions of Section 2(a) of the Robinson-Patman Act.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The petition for certiorari involves a question that has been uniformly decided adversely to petitioner's contentions by the courts of appeals and district courts, and one

which this Court has previously declined to review on writs of certiorari. This petition does not involve a special or important federal question, and the lower courts have had no difficulty resolving it.

1. As petitioner acknowledges, the instant case is "virtually identical" to that presented to this Court in *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934, *rehearing denied*, 375 U.S. 871 (No. 824, 1962 Term) (Petition for Cert., p. 4). *Willard Dairy* and all of the prior and subsequent decisions on the commerce requirements of Section 2(a) of the Robinson-Patman Act have uniformly held that three separate jurisdictional elements must be present—the seller must be "engaged in commerce", the seller must act "in the course of such commerce", and "either or any of the purchases" must be "in commerce". (15 U.S.C. § 13(a); Appendix A to Petition for Cert.)

Petitioner cites Mr. Justice Black's dissent from the denial of certiorari in *Willard Dairy;* however, in this case petitioner was afforded the precise procedural right which concerned Mr. Justice Black in that dissent. Willard had not been allowed to amend its Complaint "to add," in Mr. Justice Black's language, "this simple but *necessary factual allegation*", *i.e.*, "any price discrimination which involved *sales across state lines.*" 373 U.S. at 934-35 (emphasis supplied). Here, petitioner's proposed amendment, although submitted 31 months after the original Complaint, after the close of discovery, and at the eve of trial, was allowed in full. Yet, on this Amended Complaint and the undisputed record, and in the words of Mr. Justice Black's dissent, the "necessary" discrimination "across state lines" was still totally absent from this litigation.

2. Both before and after *Willard Dairy*, the courts of appeals have consistently construed the Robinson-Patman

Act to require proof of a sale "in commerce". The court in *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 287 F.2d 265, 267 (7th Cir. 1961), *cert. denied*, 368 U.S. 829 (No. 201, 1961 Term), held that "at least one of the purchases" must be in interstate commerce. *Willard Dairy* was decided by the Sixth Circuit one year later.

In 1964, the Seventh Circuit, in *Borden Co.* v. *FTC*, 339 F.2d 953 (7th Cir. 1964), reaffirmed its own decision in *Central Ice Cream* and agreed with the Sixth Circuit's decision in *Willard Dairy*. A petition for certiorari was not filed in *Borden* since the Solicitor General "declined to act on . . . [the FTC's] request that he seek a Supreme Court ruling." BNA Antitrust & Trade Reg. Rep. #199, p. A-2, May 4, 1965. Recently, *Borden* was described by this Court as being based upon a "want of sufficient interstate connection." *Utah Pie Co.* v. *Continental Baking Co.*, 35 U.S.L. Week 4378 n. 15 (No. 18, 1966 Term).

In the instant case, the Sixth Circuit again considered the relevant authorities and declined to overrule them. There was not one dissent in these four decisions from two separate courts of appeals.

3. Numerous districts courts have also passed upon the commerce requirements of the Robinson-Patman Act and have repeatedly and unanimously construed the statute to require sales "in commerce".[1] Congressman Wright Pat-

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[1] *Lewis* v. *Shell Oil Co.*, 50 F. Supp. 547, 549 (N.D. Ill. 1943); *Myers* v. *Shell Oil Co.*, 96 F. Supp. 670, 675-76 (S.D. Cal. 1951); *Danko* v. *Shell Oil Co.*, 115 F. Supp. 886 (E.D.N.Y. 1953); *Sears Roebuck & Co.* v. *Blade*, 110 F. Supp. 96, 101 (S.D. Cal. 1953); *Shlomchik* v. *Hygrade Bakery Co.*, 1953 Trade Cas. ¶67,632, p. 68,992; *Northern California M.D. Ass'n* v. *Interment Ass'n*, 120 F. Supp. 93, 95 (S.D. Cal. 1954); *Massachusetts Brewers Ass'n* v. *P. Ballantine & Sons Co.*, 129 F. Supp. 736, 739 (D.Mass. 1955); *Becker* v. *Safelite Glass Corp.*, 1965 Trade Cas. ¶71,587, p. 81,669 (D.Kan. 1965).

man, one of the sponsors of the amendments, and other recognized legal commentators have consistently advised that the statute requires that one of the commodities in an asserted price discrimination must be purchased in interstate commerce.[2] Significantly, the acknowledged congressional intent expressly supports these interpretations of the statute since a contrary position would, in essence, engraft an "effect on commerce" standard onto the Robinson-Patman Act, even though such specific statutory language was struck from a proposed version of the Act.[3]

4. Contrary to petitioner's assertions, none of the aforesaid decisions conflict with this Court's holding in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954). There, Mead was selling from its New Mexico plant to purchasers in New Mexico, but "did not cut its prices of bread in Farwell, Texas." 348 U.S. at 117. As this Court expressly found, the three jurisdictional requirements on commerce were present since Mead was "engaged in commerce" and, "in the course of such business", discriminated in price by "maintaining the price in the *interstate* transactions and cutting the price in the *intrastate* sales." 348 U.S. at 118. Petitioner herein has never established, or even sought to establish, that any relevant sale occurred in interstate commerce. Rather, petitioner expressly and deliberately lim-

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[2] Patman, *Complete Guide to the Robinson-Patman Act*, p. 46-47 (2d ed. 1963); Kintner, *An Antitrust Primer*, p. 61, (1964); Rowe, *Price Discrimination Under the Robinson-Patman Act*, pp. 78-80 (1962).

[3] H.R. Rep. No. 2951, 74th Cong. 2d Sess., p. 6 (1936); Rowe, *op. cit supra.* at 78; *Becker* v. *Safelite Glass Corp.*, 1965 Trade Cas. ¶71,587, p. 81,669 (D.Kan. 1965).

ited its allegations and its proof to transactions entirely within the State of Michigan.[4]

Petitioner's suggestion that *Moore* is pertinent because a corporate treasury was used to finance predatory price cutting has no foundation in either the pleadings or the evidence. No such allegation was made in the Amended Complaint [Appendix below, pp. 9a-10a];[5] moreover, petitioner has conceded that *respondent was not responsible for the price wars that occurred* in the market area or for the claimed substantial loss which petitioner suffered at that time [Appendix below, pp. 22b-26b]. Furthermore, petitioner acknowledged that it purchased from another source for substantially the same price as the price of respondent about which petitioner complained [Appendix below, p. 12b], and respondent, by sworn interrogatory answer, denied its price was below cost [Appendix below, pp. 14b-15b]. There is no factual basis whatsoever for now suggesting that predatory price cutting was ever an issue, or even an assertion, in this litigation.

CONCLUSION

Respondent respectfully submits that this case was rightly decided by the District Court and Court of Appeals, that the statutory provision has been uniformly and consistently interpreted by several courts of appeals and numerous district courts, that no issue of fundamental importance or

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[4] "The amended complaint alleges price-discrimination by respondent in the sale of milk, milk products, and retail items *within the State of Michigan.*" Petition for Cert., p. 3 (emphasis supplied).

[5] Respondent's references to the record below follow the method of citation described in footnote 1 of the Petition for Cert.

novel question of law is raised by the petition for a writ of certiorari, and that the petition therefore should be denied.

Respectfully submitted,

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